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Court of Chancery of Tennessee.

HALL ET AL. v. CHESAPEAKE, OHIO & S. W. RAILROAD CO.

A court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, although it may, by framing its order in an indirect form, compel a defendant to restore things to their former condition, and thus effectuate the same results as would be obtained by ordering a positive act to be done. The order when thus framed is called a mandatory injunction.

The true difference between a prohibitory injunction and a mandatory injunction is this: The former, when issued and executed, leaves the status of things just as it is at the time of execution. The latter, although prohibitory in form, when issued and executed works a change in the existing condition of things by prohibiting the defendant from doing the reverse of what he is desired to do, and in this way, he is compelled to do some act which restores the former condition of things.

A railroad company received rights of way over lands on condition that it should establish a permanent station at H. It established a station, and permanent improvements were made by the adjoining landowners. Afterwards it removed the station to a point three miles off, not as convenient to the general public, and refused to stop its trains at H. On a bill filed by the landowners, alleging that such refusal, if persisted in, would cause them irreparable damage and asking for an injunction to restrain the railroad from running trains past H. without stopping to give the usual facilities for receiving and delivering freight and passengers, *Held*, that the injunction asked for was a mandatory injunction and would not be granted on a preliminary application.

MOTION for preliminary injunction.

The bill was filed by certain citizens and landholders residing and owning lands in the vicinity of Hall's Station against the Chesapeake, Ohio & S. W. Railroad Company, alleging that when the railroad was in course of construction complainants gave to it rights of way over their lands upon the representation and express agreement that it had located and would establish and permanently keep at Hall's a regular depot; that it did establish and maintain from July 10th to October 15th 1882 such a depot; that in consideration of said agreement complainants built at their own expense a platform and house for receiving freight and passengers, and expended a large amount of money in permanent improvements in the vicinity; that in October 1882, the railroad established a depot at a point three miles from Hall's, at a low swampy place, inconvenient for the public, and thereupon discontinued the use of the depot at Hall's and refused to stop its trains there, and that complainants would suffer irreparable injury if the company was allowed to persist in this refusal. The bill prayed for an injunction to restrain

the railroad company from running its trains past Hall's without stopping to receive and deliver freight and passengers as at other regular stations and as the convenience of the public might require ; that the railroad company should be required to stop its trains at Hall's as aforesaid, and that it be enjoined from further interfering with the facilities which had theretofore been accorded to complainants and the public at Hall's.

The opinion of the court was delivered by

LIVINGSTON, Chancellor (after stating the facts as above).

The application for injunction was elaborately and ably argued by the learned counsel for both parties and quite a lengthy list of authorities has been presented for my consideration. As the case is one of importance, I have taken time to carefully consider it, and to look into the authorities furnished and such others as I have at my command.

The defendant's solicitor, in his argument, resists the issuance of the injunction asked, on the following grounds.

1st. He insists that the injunction sought is of that class denominated *mandatory*, and avers that the chancery practice in Tennessee, will not allow the issuance of such an injunction on mere preliminary motion, as is sought here.

2d. That there is no merit in the application, because the court of chancery will not take jurisdiction of the matters sought to be litigated in the bill.

3d. Because complainant's remedy for the wrongs complained of is by action of damages at law.

4th. That complainants are not the proper parties to enforce the performance of a duty to the general public, in the establishing and keeping up of a depot by the defendant.

Upon these several propositions the complainant's solicitors join issue, and deny their soundness.

I will undertake, so far as it may seem necessary to the decision of the matter in hand, to dispose of these propositions in the order in which they have been presented by the defendant's solicitor.

First, as to the character of the injunction sought, and the practice of the court in reference thereto. This was the point most discussed by counsel for both parties.

Story and Kerr define an injunction thus : " A writ of injunction may be described to be a judicial process whereby a party is

required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ:" Story Eq. Jur., sect. 861; Kerr on Inj., p. 11. The latter author says further, "When commanding an act to be done, it issues after decree, and is in the nature of an execution to enforce the same:" Id. Again, after classing injunctions as *interlocutory* and *perpetual* he says: "The effect and object of the interlocutory injunction is merely to preserve the property in dispute in *statu quo*, until the hearing or further order:" Id. Mr. Bispham is quite concise but very full on the same point. He says: "An injunction in its legal sense is a writ remedial, issuing by order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. An injunction may, therefore, be said to be either mandatory or prohibitory: A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act. The jurisdiction of the court to issue such a writ has been questioned; but it is now established beyond doubt. The order, however, is not *direct* in its form; but the end is reached by a writ apparently prohibitory:" Bispham's Principles of Eq., sects. 399, 400. He then gives an injunction to deliver books and papers, and remarks: "This order, it will be observed, is in terms a restraining order; but in effect it is a command to the defendant to deliver up the books and papers:" Id. Sect. 400. Again he says: "A prohibitory injunction, as its name imports, is one which is granted for the purpose of restraining the defendant from the continuance or commission of some act which is injurious to the plaintiff:" Sect. 401.

These general propositions are sustained by all the elementary authors who treat of injunctions. I make one other extract from Kerr on Injunctions. Under the title "Mandatory Injunctions," he says: "Though a court of equity has no jurisdiction to compel the performance of a positive act tending to alter the existing state of things, such as the removal of a work already executed, it may, by framing the order in an *indirect* form, compel a defendant to restore things to their former condition, and so effectuate the same results as would be obtained by ordering a positive act to be done. The order when framed in such a form is called a mandatory injunction:" Id. p. 231, sect. 12.

It is quite obvious, therefore, that the real difference between a

prohibitory and a mandatory injunction does not consist in the *form* in which they are drawn. They are both prohibitory in terms. The difference consists in the results produced when the writs are executed. The prohibitory injunction, when executed, leaves the rights of the parties and the condition of the property in the *status* in which they are found when the writ is sued out. The mandatory injunction, though simply prohibitory in form, effectuates, when executed and obeyed, a change in the *status* of affairs, and the defendant is compelled to do some act, by which the former condition of things is restored. This *positive* result is reached "by prohibiting the defendant from doing the reverse of what he is desired to do:" High on Inj., sect. 2.

Apply these plain rules of law to the case in hand, and what conclusion results? The bill alleges that the defendant, in constructing its road, established one of its depots at Hall's, and used, accepted and treated this point as one of its regular depots, from the time its road was opened, on July 10th 1882, to October 15th 1882, a period of three months. That during this period all the trains, both freight and passenger, stopped daily and regularly at this point, and that freights and passengers were received, discharged, shipped and transported by defendant at and from this point over and from said trains. This was the *former* condition of things, prior to October 15th 1882. Since then, and at the present time, the defendant has discontinued Hall's as a depot, or shipping point, on its road, the trains passing without stopping, and no freights or passengers coming to or going from Hall's over defendant's trains, the defendant refusing to receive, discharge, transport, deliver or forward, freights or passengers at, to or from Hall's, as one of its depots. This is the *existing* condition of affairs, and this has been the *status* for seven months prior to the presentation of the bill for fiat.

Suppose an injunction to issue restraining and prohibiting the defendant from running any of its trains, freight or passenger, over its road by Hall's without stopping them at this point as regularly as at the other depots on the road; and enjoining the defendant from refusing to receive, discharge, transport, deliver and forward freights and passengers over all its trains at, to and from Hall's as at any other of its regular depots, and such an injunction is served, and obeyed by the defendant; will any one argue that the result will be to maintain the present state of affairs at

Hall's. On the contrary, is it not clear that the effect would be to restore the former condition of things—that existing from July 10th 1882 to October 15th 1882. It is too clear for discussion, that the necessary result would be to compel defendant to re-establish and maintain a depot at Hall's. If this be so, it clearly follows that such an injunction would belong to the class known in the books as *mandatory*.

This point being settled, the next question for consideration is, whether such an injunction will issue in our practice on preliminary motion. The question is not entirely free from difficulty.

That courts of equity will issue mandatory injunctions on final hearing, and in execution of their decrees, is well established. Not so, however, when the application is made by preliminary motion, on a bill not yet in court. Let us first look into the authorities and rulings of the courts outside of Tennessee, to see if we may not gather some light which will aid in the investigation in hand.

In England we find different rulings and holdings on this question. Some of the judges have asserted and exercised this jurisdiction, in extreme cases: *Lane v. Newdigate*, 10 Vesey 192; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Beadel v. Perry*, L. R., 3 Eq. 465.

Other eminent judges have as stoutly refused and denied the jurisdiction. *Anonymous case* by Lord THURLOW, 1 Vesey, Jr., 140; *Gale v. Abbott*, 8 Jur. N. S. 987; *Child v. Douglas*, Kay 578. Other cases, *both pro and con*, might be adduced, if anything was to be gained by it. The English law writers seem to think the jurisdiction *may* be exercised in extreme cases: Kerr on Inj. 232; 2 Dan. Chan. Prac. 1662–3.

The courts of the United States have been more chary than those of England in this direction, and this extraordinary power has been less frequently asserted and exercised. Still, a few cases of the kind may be found in the state and federal courts. *Cole Silver Mining Co. v. Virginia, &c., Water Co.*, 1 Sawyer 565; *Camblos v. Philadelphia Railroad Co.*, 4 Brewster 563. These two references are taken from Judge COOPER's note 8 to 2 Dan. Chan. Prac. 1663, and I cannot vouch for the position claimed for them by Judge COOPER. I would infer, however, from a synopsis of the 4 Brewster case, found in note of Mr. Prichard to the case of *Southern Ex. Co. v. Nashville, &c., Railway Co.*, 20 Am. Law Reg. N. S. 604–5, that Judge COOPER is mistaken in supposing

that the case sustains the proposition for which he cites it in his note. It appears from the synopsis given that the preliminary mandatory injunction was refused, and the bill dismissed on demurrer. This was a federal court case from Pennsylvania. On the other hand we have a number of cases—some of them ably and well considered—which deny the jurisdiction of courts of equity thus summarily to dispose of the rights of parties. Judge COOPER in note 2 to Dan. Chan. Prac. 1662, says, “A mandatory injunction will not be ordered on a preliminary or interlocutory motion, and only on final hearing to execute the decree of the court.” He cites for this proposition, *Audenreid v. Railroad Co.*, 68 Penn. St. 370; *McCauley v. Kellogg*, 2 Wood 13; *Rogers, &c., v. Erie Railway Co.*, 5 C. E. Green 379. Again he says, same note, “An injunction is no remedy for past injuries,” and cites *McMinville, &c. v. Huggins*, 7 Cold. 217; *Rutherford v. Metcalf*, 5 Hay. 58; *Owen v. Ford*, 49 Mo. 436; 2 Stew. Eq. 6. Again, in same note, “An injunction requiring a party to do a particular thing, as to surrender possession of premises, is never allowed before final hearing,” citing *Kamm v. Stark*, 1 Sawyer 547.

I have examined the case of *Audenried v. Railroad Co.*, 68 Pa. St. 370, reported also in 1 Am. Railway cases, by Truman, p. 515, and find it an ably argued and well-reasoned case by the highest court of Pennsylvania, that very eminent jurist, the late Judge SHARSWOOD, delivering the unanimous opinion of the court. He examines fully the English cases bearing on the question and traces all those in favor of the summary exercise of this extraordinary jurisdiction to the case of *Lane v. Newdigate*, 10 Ves. 192, which latter case, he says, ought not to be followed in any court. He wisely remarks, that, “an injunction as a measure of mere temporary restraint is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go farther.” The chancellor had granted a mandatory injunction, following closely *Lane v. Newdigate*. An appeal from the order granting the process was taken, and the court above reversed the order of the chancellor, holding that such an injunction would never be granted before final hearing. Quite a number of cases from American courts are cited, and quoted from, by the court, sustaining the views of that court.

Chancellor GREEN, of New Jersey, a very high authority on the jurisdiction and practice of courts of equity, arrived at a simi-

lar conclusion, after an examination of all the authorities, in the case of *Rogers, &c. v. Railway Co.*, 5 C. E. Green 387, cited in his note 2 to Dan. Ch. Pr. 1662, by Judge COOPER. As to the conclusion reached by Chancellor GREEN, see Am. note to Kerr on Inj. 231.

Judge REDFIELD, in his note 1 to sec. 861 of his edition of Story's Eq. Jur., uses this language: "It seems a Court of Equity has no power to order a party to undo what he has done (*Bradbury v. Manchester, &c., Railroad Co.*, 8 Eng. Law and Eq. 143), unless after a decree; in which case the injunction becomes a judicial process. *Washington University v. Green*, 1 Md. Ch., Dec. 97."

Thus it will be seen that the courts in this country are not in entire accord on this question. The jurisdiction has been exercised and asserted in a few *extreme* cases; but in a larger number of cases, and by abler judges, perhaps, the jurisdiction has been denied and repudiated. I think Mr. Bispham not very far wrong when he says, as his conclusion of the matter, "A mandatory injunction is granted only with great caution; and the courts are particularly reluctant to grant such an injunction upon an interlocutory application, and before final decree. Indeed, the inclination of American courts is against granting such an interlocutory injunction. But in England, the better opinion is, that a mandatory injunction *may* be had on interlocutory application." Bisph. Eq. Principles, sec. 400. I think he might have expressed himself in still stronger language, when referring to the "inclination" of the American courts, as being against the practice.

Complainant's solicitors referred to and relied upon the case of *Southern Express Co. v. L. & N. Railroad Co.*, 20 Am. Law Reg. N. S. 590, and to the action of the other federal judges in kindred cases, as shown by Judge BAXTER's opinion. I find nothing in this case, or these cases, which contravenes the view of the case which I have just announced. 1. The practice of granting injunctions is different in the Federal from the state court practice. 2. The orders granted in these cases, so far as I gather from Judge BAXTER's opinion, were "restraining orders," which operated not as a mandatory injunction, to change the then existing state of things, but simply to keep matters in *statu quo* until the hearing. The order by Judge BAXTER granting the preliminary injunction, is given in 2 Flippin's U. S. Rep. (6th Circuit) 688, and is clearly not for

a mandatory injunction. 3. The question of the power of the court to issue a *mandatory* injunction is not hinted at in the opinion, nor in the reporter's note in connection with the case. The same considerations apply to the Nashville stockyard case from the same court.

I have been referred, also, to the last paragraph on 724th page of 3 Waite's Actions and Def., under title "Injunctions against Railroads." It is sufficient to say of this reference, that there is nothing in what the author says which indicates, in any manner, as to how or when the injunctions referred to were granted.

The cases of *Henry v. Koch*, from Kentucky Court of Appeals, 22 Am. Law Reg. N. S. 394, and *Corning v. Troy Iron and Nail Factory*, 40 N. Y. (1 Hand.) 191, were pressed in argument by complainant's solicitors, as very favorable to their view of this question. I have examined those cases, and find that the injunctions were ordered on final decree, and not before. No reference is made, in either case, to the power of the court to grant such an injunction on interlocutory motion.

As before indicated, I am of opinion that the practice of the American courts is clearly against this extraordinary means of redress. This is true of the courts outside of Tennessee. Is the practice in our state in accord with this decided current outside of the state? I think so. It is true we have but little in our decisions upon the mooted question, but I think that little is all pointing in one direction.

The first case to which I refer is that of *Rutherford v. Metcalf*, 5 Hay. 58. I quote from the reporter's head-notes. "An injunction may issue to quiet a person in possession of land until the hearing, if the bill shows that he is in possession, and that he is likely to be turned out before his right can be investigated in court." Again, "But the injunction cannot command the defendant to repair a wrong already done, but only to abstain from doing wrong; and cannot be construed as forbidding the defendant to keep possession of that which he actually had at the time of the injunction."

The question before the court was whether the defendant had been guilty of a breach of the injunction granted on motion, and involved a discussion of the scope of the injunction. While the direct question was not before the court in that case, yet it can be clearly seen from the opinion in the case, as to what the judge's

views of an injunction granted on preliminary motion were. He very clearly intimates, as the syllabus indicates, that the possession could not be changed by preliminary injunction, and that the only office to be served by an injunction was to maintain the *status quo* until hearing.

I refer now to the case of *McMinnville, &c., Railroad v. Huggins*, 7 Cold. 218. The bill prayed for an injunction to restrain the defendants, Huggins and Price, from controlling, directing or running the railroad in litigation, and from interfering with complainant, Marbury, in the discharge of his duty as receiver of said road; and that Marbury be put in full and complete possession thereof. The defendants, Huggins and Price, were then in possession. The chancellor granted a preliminary injunction as prayed for. The master issued an injunction, not only restraining the defendants as prayed in the bill, but going beyond the fiat and commanding the sheriff to put the receiver in possession of the road, and the sheriff executed the writ and placed Marbury in possession as commanded.

Huggins and Price filed answers and moved the chancellor, at Chambers, to dissolve the injunction, and for an order restoring them to possession. This motion prevailed, the injunction was dissolved, and an order made placing Huggins and Price in possession, which was done.

The receiver and the railroad company filed a petition in the Supreme Court for a *supersedeas* to the court below to supersede this last order of the chancellor, to the end that same might be reversed by the Supreme Court. This petition was filed under sec. 3933 of the Code of Tenn., and the decision involved a construction of this section and the practice under it.

Judge ANDREWS, delivering the opinion of the court, says: "The question is, whether, under the authority given us to grant *supersedeas* to interlocutory orders and decrees, we may not set aside orders of the chancellor, granting and dissolving injunctions; or whether our authority is limited to the staying of proceedings under decrees which are of a nature to be actively and affirmatively enforced against a party." P. 223.

He declares that the power to supersede under this section, only extended to such interlocutory orders and decrees, as may be enforced actively against a party; and then proceeds to make an application of the holding to the case before him. To this end he

discusses the nature and office of injunctions, and says: "An injunction in our practice is a prohibitory writ, and its office is to restrain, and not to compel, performance. It does not authorize any act to be done, and there can be no proceeding under it capable of being stayed by a supersedeas." P. 225. "So of an order dissolving an injunction. Such an order removes the prohibition imposed by the injunction, but does not itself require or authorize the doing of an act." Again he says: "Neither under the injunction, or the order dissolving it, is there any proceeding which can be stayed." Id.

The language used clearly negatives the idea that we have any such writ in our practice as a *mandatory* injunction upon an *interlocutory* motion. But it is said of the language quoted that it was unnecessary to the decision of the case, and therefore but the *dictum* of the judge who used it. It is true, the order granting the injunction was not directly involved in the question then before the court. But the learned judge construes the section involved, and, in ascertaining the character and nature of an order to dissolve, he, in part, reaches his conclusion from the known character and office of the injunction and the order granting it. He arrives at the conclusion that the order dissolving must necessarily be negative and passive in its character, *because*, and for the reason, the injunction, in our practice, is *prohibitory* only. I am unable to say, therefore, with the learned counsel for complainants, that this is the mere *dictum* of Judge ANDREWS.

The language quoted has never been questioned by any subsequent decision, so far as I am aware, although the case has been cited and followed as authority repeatedly since it was decided. This construction of the statute, sec. 3933, has been frequently adopted by our court upon the authority of this case. See *Mabry v. Ross*, 1 Heisk. 776; *Redmond v. Redmond*, 1 Leg. Rep. (Tenn.) 361; 12 Heisk. 506; 1 Lea 78; Id. 396; 8 Id. 465. In the 1 Heiskell case, p. 776, the court uses this language: "The question came before this court again in the case of *McMinnville, &c., Railroad Co. v. Huggins*, 7 Cold. 217. In that case it is held that this court has not the jurisdiction, under the statute, to set aside a temporary injunction or an order dissolving such an injunction. The reasoning of Mr. Justice ANDREWS in that case is conclusive, and we may be permitted to commend it as the leading case upon the interpretation of these statutes."

In *Redmond v. Redmond*, 1 Leg. Rep. (Tenn.) 361, reported also in 9 Baxter 561, Judge MCFARLAND, delivering the unanimous opinion of our Supreme Court, on a motion to discharge a supersedeas granted by one of the judges, superseding an order for an attachment to issue from the chancery court, after citing *approvingly* the case from 7 Coldwell 217, said, "but we have no power in this mode to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a *negative or prohibitory character*, or such as have been executed. *We cannot, therefore, supersede an order granting an injunction, as this requires nothing to be done, but is simply prohibitory.*" Mark the language of the learned judge. It certainly is not devoid of meaning. The italicizing is my own.

I know of no case in our state reports which can be tortured into a holding different from what is said in the 5 Haywood case, the 7 Coldwell case, and the 9 Baxter case.

As further support for the position I have just indicated as to the practice in this state, I refer to "Hick's Tennessee Manual of Chancery Practice," p. 267-9, sub-sec. 6. This author is clearly of opinion that the language of Justice ANDREWS, in the 7th Coldwell case, which he quotes, states the true rule in Tennessee. His criticism of Lord ELDON's ruling in *Lane v. Newdigate* is quite severe, but just.

I must conclude, therefore, that the practice in our state is in harmony with the holdings of the majority of the American courts on this question, and that the application for the preliminary injunction should be refused.

This renders any consideration of the other points, discussed by the learned counsel, unnecessary, and I decline to go into such discussion for the present. The fiat for injunction, on preliminary motion, is refused.
